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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 MARK WAYNE CROW,

9 Petitioner,

Case No. C10-2076-RSM

10 v.

DISMISSAL ORDER

11 ELDON VAIL

12 Respondent.

13 Mark Wayne Crow, a Washington State prisoner, seeks 28 U.S.C. § 2254 habeas relief
14 from his conviction for possession with intent to deliver methamphetamine on the ground that he
15 was denied effective assistance of counsel. Dkt. 1. This matter comes before the Court upon Mr.
16 Crow's Objections to the Report and Recommendation of of the Honorable Brian A. Tsuchida
17 (Dkt. 24). Magistrate Judge Tsuchida recommends dismissing this action with prejudice because
18 petitioner did not properly exhaust his sixth amendment claim for ineffective assistance of
19 counsel in state court. *See Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). Moreover, the
20 ineffective assistance of counsel claim is now procedurally defaulted.

21 In his Objections to the Report and Recommendation, Mr. Crow seeks leave of the Court
22 to amend his pleadings to include other claims that he allegedly exhausted in state court. *See*
23 Dkt. 24, p. 3 ("The lower courts then had at all times fair opportunity to re-consider a
petitioner's claims on due process, right to confront witnesses, and most importantly the federal

1 Fourth Amendment violation, which is binding on the court. The proposed amended petition
2 pleading in this action, should now reflect the argument to controvert respondents opposition of
3 this habeas corpus for unlawful restraint against U.S. Constitutional violations.”). Judge
4 Tsuchida notes in his Report and Recommendation that Mr. Crow did indeed appeal his state
5 court conviction on other grounds, namely on the grounds of the legality of the search warrant
6 issued by the state court; the trial court’s jury instructions; the state’s failure to prove the
7 elements of the crime beyond a reasonable; unlawful seizure of his money; denial of his right to
8 confront his accuser; and improper admission of hearsay. Dkt. 21 at Exhibits 3 & 4. Thus, the
9 Court construes Mr. Crow’s Objections as encompassing a motion for leave to amend his
10 petition to include the allegedly exhausted claims.

11 The Court should freely give leave to amend when justice so requires. Fed. R. Civ. P. 15.
12 Moreover, “a petition for habeas corpus should not be dismissed without leave to amend unless it
13 appears that no tenable claim for relief can be pleaded were such leave granted.” *Jarvis v.*
14 *Nelson*, 440 F.2d 13, 14 (9th Cir. 1971) (internal citations omitted). Therefore, the Court
15 dismisses Mr. Crow’s petition without prejudice to petitioner filing an amended petition
16 including the exhausted claims.

17 The Court cannot ascertain from Mr. Crow’s objections whether he intends to include his
18 exhausted sixth amendment ineffective assistance of counsel claim in his amended petition. The
19 Court notes that where a habeas corpus petition is a “mixed petition,” setting forth both claims
20 that have been exhausted and claims that have not been exhausted, the petition will be dismissed.
21 See *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1169 n.
22 3 (9th Cir.2003). Further, while a court may stay a proceeding and hold a habeas petition in
23 abeyance while a petitioner exhausts state court remedies on unexhausted claims, the Court may
only do so “when the district court determines there was good cause for the petitioner's failure to

1 exhaust his claims first in state court.” *Rhines v. Weber*, 544 U.S. 269, 277, 1 (2005); *see also*
2 *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir.) (“Under *Rhines*, a district court must stay a
3 mixed petition only if: (1) the petitioner has ‘good cause’ for his failure to exhaust his claims in
4 state court; (2) the unexhausted claims are potentially meritorious; and (3) there is no indication
5 that the petitioner intentionally engaged in dilatory litigation tactics.”), cert. dismissed, --- U.S. --
6 --, 129 S.Ct. 621, 172 L.Ed.2d 473 (2008), and cert. denied, --- U.S. ----, 129 S.Ct. 2771, 174
7 L.Ed.2d 276 (2009). Here, Petitioner’s sixth amendment claim is procedurally defaulted and Mr.
8 Crow has failed to show good cause for his failure to exhaust his sixth amendment claim in state
9 court. *See* Dkt. 23. Therefore, if petitioner includes his unexhausted sixth amendment claim in
10 his amended petition, his petition will be dismissed.

11 Accordingly, the Court, having reviewed petitioner’s petition for writ of habeas corpus,
12 the Report and Recommendation of the Honorable Brian A. Tsuchida, United States Magistrate
13 Judge, and the remaining record, does hereby find and **ORDER**:

- 14 1. The Court adopts the Report and Recommendation insofar as its findings
15 regarding (1) the fact that Mr. Crow’s claim for ineffective assistance of counsel
16 has not been exhausted in state court; (2) the fact that Mr. Crow’s claim for
17 ineffective assistance of counsel is procedurally defaulted; and (3) the fact that
18 Mr. Crow has not shown good cause for his failure to exhaust his claim for
19 ineffective assistance of counsel. In light of Mr. Crow’s motion to amend his
20 petition, the Court declines to adopt the portion of the Report and
21 Recommendation that recommends dismissal with prejudice.
- 22 2. The habeas petition is dismissed without prejudice to petitioner filing, no later
23 than thirty (30) days from the date of this Order, an amended petition containing
only exhausted claims. If petitioner does not timely file an amended petition

1 raising only exhausted claims, or if petitioner requests this Court dismiss without
2 prejudice this action, the Court will dismiss this action without prejudice.

3 3. The Clerk shall send copies of this Order to petitioner and to Judge Tsuchida.

4 DATED this 22nd day of September 2011.

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8 RICARDO S. MARTINEZ
9 UNITED STATES DISTRICT JUDGE
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